United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7339
75-7350

To be argued by:
LESTER E. FETELL

United States Court of Appeals

FOR THE SECOND CIRCUIT

MICHAEL CASTELLANO,
Plaintiff-Appellee,

v.

RUDOLF A. OETKER, "POLARSTEIN",
Defendant-Appellee-Appellant.

RUDOLF OETKER,
Third Party Plaintiff-Appellee-Appellant,

v.

BAY RIDGE OPERATING CO. INC., and STANDARD FRUIT & STEAMSHIP CO.,
Third Party Defendants-Appellants,

STANDARD FRUIT & STEAMSHIP CO.,
Third Party Defendant-Appellant,

(& in 75-7350).

On Appeal from the United States District Court For the Eastern District of New York

BRIEF OF THIRD PARTY DEFENDANT-APPELLANT STANDARD FRUIT COMPANY

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Statement

The third party action was reserved to the trial court for non-jury resolution. The jury returned a verdict in favor of plaintiff against the sole defendant Oetker in the sum of $75,000.00. The trial court then made the following rulings:

1. Denied all motions for a directed verdict with respect to plaintiff's claims.

2. Denied all motions for judgment n.o.v. with respect to the jury verdict in favor of plaintiff and against Oetker.

3. Granted defendant Oetker full indemnity, plus counsel fees and costs, in favor of Oetker and against third party defendant Bay Ridge Operating Co. Inc. (stevedore), pursuant to the doctrine of *Ryan* v. *Pan Atlantic S.S. Co.,* 350 U.S. 124.

4. Dismissed the cross claims and counterclaims of Bay Ridge against Oetker.

5. Dismissed the cross claims of Bay Ridge and Standard inter se.

6. Held Standard liable to Bay Ridge for fifty percent of the sums to be paid by Bay Ridge, as its indemnity to Oetker (in effect giving shipowner Oetker fifty per cent "indemnity" against Standard, pursuant to *Cooper Stevedoring Co., Inc.* v. *Fritz Kopke Inc.,* 417 U.S. 106.

Standard appeals from the plaintiff's judgment against Oetker, as well as the judgment over in favor of Bay Ridge and against Standard.

Issues on this Appeal

1. Did plaintiff make out a prima facie case in negligence and unseaworthiness against the shipowner Oetker?

2. Did the trial court err in denying all motions to dismiss plaintiff's complaint against shipowner.

3. Did the court below err in entering judgment in favor of Bay Ridge, and against Standard for fifty per cent of Bay Ridge's judgment in favor of Oetker.

The Claims of the Various Parties Against Each Other

1. Plaintiff, a longshoreman, sued shipowner Oetker to recover damages for personal injuries by reason of the alleged negligence of Oetker, and the unseaworthiness of the vessel "Polarstein" (Complaint par. Seventh) (7).* Jurisdiction was predicated upon Sections 1332 and 1333 of the United States Code (Complaint par. Ninth) (7).

2. Defendant Oetker served a Third Party complaint (8). It alleged that Bay Ridge "its agents, servants and/or employees were aboard the SS POLARSTEIN and engaged in the performance of the stevedoring services which they had agreed to provide" (Third Party Complaint par. Fifth) (9) and further alleged that Bay Ridge breached "its warranty to perform its services in a reasonably safe, proper, careful, prudent and workmanlike manner" (Par. Seventh) (10); and further that Bay Ridge was guilty of "active primary and affirmative negligence" (Par. Seventh) (10).

3. The Third Party complaint made the following allegations against Standard: "Standard agreed and under-

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* The numbers in parenthesis refer to pages of the Joint Appendix.

took to provide (the vessel) with safe, proper, fit and seaworthy equipment . . ." (Par. Eleventh) (10); and that Standard "negligently, carelessly and recklessly failed to supply reasonably safe, proper, fit and seaworthy materials and conveyor equipment . . ." (Par. Fifteenth) (11) and was therefore guilty of "active and affirmative negligence and fault" (Par. Fifteenth) (11).

4. In its Answer to the Third Party complaint, Standard asserted a cross claim against Bay (13).

5. Bay Ridge, in its Answer to the cross claim to Standard, also asserted a cross claim against Standard (18).

6. Bay Ridge, in its Answer to the Third Party complaint, counterclaimed against Third Party Plaintiff Oetker (23).

The parties agreed to submit all third party claims to the court for non-jury resolution.

In summary, plaintiff's action against the vessel was the classic *Seas Shipping* v. *Sieracki,* 328 U.S. 85 action. The shipowner's third party complaint against Oetker was the classic *Ryan* v. *Pan Atlantic,* 350 U.S. 124 claim for indemnity, predicated upon the stevedore's breach of its warranty of workmanlike services. The third party action against Standard was in *tort,* predicated upon a claim that Standard *negligently* provided defective equipment (Claims of the Parties, supra No. 3). Bay Ridge's counterclaim against Oetker was in essence a claim of negligent conduct precluding indemnity, pursuant to the doctrine of *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.,* 335 U.S. 563.

POINT I

Plaintiff did not make out a prima facie case in negligence or unseaworthiness against shipowner Oetker.

It is axiomatic that in the absence of a valid underlying claim against the defendant-third party plaintiff shipowner, there can be no third party claim over. The predicate for third party liability must be found in two separate areas (a) the factual and legal basis for plaintiff's successful claim and (b) the status of the third party defendant which bespeaks the latter's obligation to respond to third party plaintiff, or some other party cross claiming.

In essence, appellant Standard urges that plaintiff did not make out a prima facie case, against defendant shipowner; and alternatively, if plaintiff did, then the trial court erred in assessing divided damages against Standard.

Plaintiff Castellano was in the employ of Third Party Plaintiff Bay Ridge Operating Co. ("Stevedore" or "Bay Ridge"). He was an electrical maintenance man, working as part of a longshore gang engaged in the discharging of boxes of bananas from the SS POLARSTEIN, a vessel owned by defendant Oetker ("shipowner").

On January 15, 1970, plaintiff was unplugging an electrical cord in the hold of the POLARSTEIN, when he was struck by a carton which fell through the square of the hatch, from above.

In order to accomplish the discharge of the bananas, conveyors and rollers were distributed throughout the various levels of the hold. At each level members of the longshore gang performed various necessary tasks. Plaintiff's sole duties consisted of plugging in and unplugging

the electrical connections to the conveyor system (33), and between-times he worked on the dock preparing and repairing the equipment (70).

This equipment admittedly was owned by Standard (137). In December 1969, prior to plaintiff's accident, these conveyors "were given to Bay Ridge to do work aboard vessels and unload ships" (137). Between the arrival of vessels, the equipment was retained by Bay Ridge, stored by Bay Ridge on a barge, and maintanied by Bay Ridge (138). Plaintiff was one of the very persons who "fixed" or maintained this equipment, on behalf of Bay Ridge (70).[1]

Standard had nothing to do with the equipment during the time of it's possession and use by Bay Ridge (138).

The equipment was brought aboard ship from the barge by Bay Ridge; it was positioned in the holds by Bay Ridge, as required for discharge of cargo. It was Bay Ridge's hatch boss who directed the operation and placement of equipment (138). Plaintiff himself conceded that "the ones who were in charge of stopping the operation and not letting boxes fall off are Bay Ridge stevedores" (57).

While plaintiff was standing in the square of the hatch, he bent down to pull a plug, when "something" hit him (57). He himself did not know what hit him, at first. He learned that it was a box of bananas (57):

> "Q. Did you ever see where that box came from before it hit you?

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[1] It is worthy of note that the third party complaint alleges that Standard "agreed and undertook to provide" the equipment. There is no affirmative statement that the equipment was provided directly to shipowner. The record demonstrates that in fact it was provided directly to Bay Ridge. This distinction becomes important in the analysis of the third party actions, infra.

A. No.

Q. So you don't know if it came from C deck, is that right?

A. Yes.

Q. You don't know if it came from B deck; is that right?

A. Right.

Q. In fact you don't know if it came over a conveyor; isn't that correct?

A. Right.

Q. You don't know if one of your co-workers dropped it; isn't that correct? Therefore, the difference in the boxes, in the size of the box and the size of the rail on the side as far as you know had nothing to do with this accident because you don't know where the boxes came from; isn't that right?

A. Right".[2]

Plaintiff called as a witness a fellow longshoreman, Edward Salvatore (78), whose sole contribution to the plaintiff's case was to demonstrate that it was a box of bananas which struck plaintiff. Salvatore confirmed that it was the Bay Ridge longshore gang which controlled the gear, selected the gear, and "set up" the gear (80). (82):

"Q. Do you know where the box came from?

A. No.

Q. You didn't see this box fall off?

A. No."

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[2] Mr. Sergi (Standard's counsel) moved to strike the plaintiff's testimony. The court quite properly denied that motion, at that time, on the ground that the motion was premature. "This isn't the end of the plaintiff's case" (58). Mr. Sergi was premature, but nevertheless prescient. The Court took plaintiff's testimony subject to connection. The connection was never forthcoming.

Salvatore further confirmed the fact that Bay Ridge was cognizant of the fact that for at least a year before plaintiff's accident there had been a change in box size (84).[3]

Notwithstanding this witness's testimony vis-a-vis the side rails, the dimensions and weight of the various cartons (81), his testimony in nowise demonstrated directly or otherwise, that there was any relationship between these facts and the box falling. The causal connection, if any, was still to be forthcoming from plaintiff (in fact it never came).

Plaintiff next called Willie Jackson (96), a fellow longshoreman; the operator of the conveyor controls at A deck (97). He testified that he assisted other Bay Ridge longshoremen in setting up the conveyor gear for discharging bananas (98):

> "Q. When you finish making that hole, how does the machine come down?
>
> A. *The deckmen send it down. We range it up, we build it up to the size we want.*" (Italics added).

After assisting in setting up the machinery, Jackson went to A deck to "run the belt" (99). The control consists of a foot pedal which starts the conveyor running when he puts his foot on it, and it stops when he removes his foot (100). This is commonly referred to as

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[3] This fact is significant in connection with the third party action, where the trial court charged Standard with knowledge that the cargo on the POLARSTEIN included boxes of varying sizes. Salvatore's testimony confirms the fact that Bay Ridge was also knowledgeable in that respect, and such knowledge will not support the court's finding that Standard "hindered" Bay Ridge by not imparting that knowledge. This will be covered infra in a discussion of the third party actions.

a dead man's switch. From his position on A deck he can see the activity at B deck (100). He stated that if the boxes are not properly placed on the belt they may be caused to turn (102), and "they will fall off, some of them" (102).

Jackson testified that the box which struck plaintiff came "off my machine" (107). A careful reading of his testimony (which is reproduced in its entirety, in the Appendix, as is the entire testimony of Castellano and Salvatore) will demonstrate that Jackson never related the side rails, or anything else for that matter, to the accident. His testimony was classic *post hoc propter hoc.*

He testified that from 0800 hours to approximately 1830 hours one size box was coming out of the vessel. At 1830-hours "taller boxes" came out of the hold (110). The longshoremen made an equipment change "to accommodate the higher boxes"[4] (100). The longshoremen "lowered the belt" (110). Whether this had anything to do with the box falling was never demonstrated in the record. This record is replete with miscellaneous bits and pieces of factual data, none of which were ever related to the cause of the accident. Plaintiff never made a connection.

Jackson described two incidents, one of which led to the boxes "hanging up", and the second one ending in a box falling. These two incidents are the essence of plaintiff's case. He stated that around 2200 hours a "mate or officer of the vessel" approached him and in-

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[4] This testimony further demonstrates the error of the trial court in ascribing to the shipowner and Standard, only, knowledge which the stevedore likewise had. This further relates to the court's discussion of the party best able to minimize the risk, with respect to the problem of box size. This will be discussed infra in regard to the third party claims.

quired as to how long it would take them to complete discharge (114, 115).

> "Q. While he was standing there did anything happen on the conveyor belt?
>
> A. The boxes got hung up so I stopped the belt."

A longshoreman straightened up the boxes, and the belt was started up again, *without incident* (116) and the ma[illegible] left. It was this incident upon which plaintiff rests his entire case of negligence. He asserts that the fact that the mate was present when the "boxes got hung up" is scienter, of a defect. This incident will not support a finding of negligence or scienter. The court properly charged the jury with respect to the elements of negligence (169). What was lacking in this record was even a scintilla of testimony to demonstrate just what defect plaintiff alleges defendant shipowner had notice of; nor was there proof of the length of time plaintiff alleges the condition existed. The mere fleeting hanging up of a box will not suffice, as a matter of law.

Plaintiff lamely attempted to demonstrate that at some prior point in time that day another box had fallen (11[illegible]).

> "Q. When these boxes had fallen down (sic), do you know whether there were any officers or mates where those boxes fell?
>
> A. *Once* there was a mate when one fell.
>
> The Court: On the same day.
>
> The Witness: On the same day, yes."

The plaintiff's attorney never pursued this, he switched over to a discussion of safety helmets (119). Here again, no effort was made to discuss a cause for such a box falling, from where it fell, etc. etc. The negligence claim

predicated upon scienter of a defective condition must fail.[5]

The next incident, preceding the falling box which struck plaintiff, is equally vague (117):

> "Q. When he straightened it out, were there any boxes of bananas on your belt?
>
> A. Yes, there was.
>
> Q. After it was straightened out, what did you do?
>
> A. I started running again, my belt, when I started running when the belt—the belt automatically jumped. When the boxes went tumbling, then I took my foot off the belt right away. Stopped the boxes from tumbling and it fell in the hole.
>
> Q. In other word, Mr. Jackson, you're saying when you started the belt the boxes of bananas on the belt started to tumble?
>
> A. Yes.
>
> Q. And then you took your foot off to stop the belt but that didn't stop the boxes and they went over the side of the conveyor and went down in the hole?
>
> A. Yes."

It was that box which allegedly struck plaintiff. Even counsel's obvious leading of the witness was insufficient to predicate liability upon this box tumbling. Res ipsa loquitur does not apply here. A box may fall for a multitude of reasons, human error of a fellow longshoreman,

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[5] Emphasis is placed on the word condition. If the boxes were caused to fall by reason of some *act*, negligent or otherwise, of a fellow longshoreman, plaintiff would be out of court. *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494.

improper handling, defective equipment, improper repositioning of the conveyor, etc.

Chief Judge Brietel of the New York State Court of Appeals postulated this legal proposition in very succinct form and terminology in a recent case, as yet unreported. *Rinaldi and Sons Inc.* v. *Wells Fargo Alarm Service,* —— N.Y.2d —— (slip opinion April 1, 1976):

> "It is a truism that a plaintiff must prove his case, and that means by a preponderance of the evidence."

Judge Breitel held that:

> ". . . conflicting opinions were based on identical evidentiary facts, about which there was no dispute, and no intruding valuation based on credibility or accuracy . . ."

he then concluded:

> "It may be said that as a matter of logic one inference was just as likely to be true as the other. In such case there as a 50% probability, and a 50% probability means that no one result is any more like than the other, as a matter of logical necessity, and therefore as a matter of law. Plaintiff has the burden of proving his case by a fair preponderance of the credible evidence. If, at the close of the proof, the evidence, as a matter of logical necessity is equally balanced, the plaintiff has failed to meet his burden and the cause of action is not made out."

At bar, the plaintiff has not established *any* evidentiary facts from which a jury could conclude that there was negligent conduct, let alone facts "about which there

was no dispute". If 50/50 balances the scales of justice, and results in non-suit, the percentages at bar are clearly of far greater inequality, and should have resulted in non-suit, on the negligence issue.

Unseaworthiness

On this issue, plaintiff's case suffers from the same infirmities as does his negligence count. He failed to demonstrate not only the cause of the accident, he has not demonstrated any *condition* causing the accident. With respect to the matter of side rails, there was no showing that the actual size of the rails, as they existed at the time of his accident was a competent producing cause of the falling box. Here again, one is faced with a multitude of possible causes. Since plaintiff would not be entitled to a verdict if the unseaworthiness arose by reason of some act of a fellow longshoreman (operational negligence) under the doctrine of *Usner* v. *Luckenbach,* supra, perforce, he was required to isolate the condition which caused the accident, even though he was not required to demonstrate what brought about the condition *Oliveras* v. *American Export Isbrandtsen Lines,* 431 F2d 814. In *Oliveras* the parties conceded that the door moved by reason of a defective hook. There was no showing, at bar, just how many of the larger size boxes passed over the conveyor and out of the vessel, before the one or two boxes came off the belt. Had plaintiff demonstrated that the side rails were inadequate to sustain *any* of the larger boxes, the jury could have concluded that the rails were simply the wrong size for the larger boxes. The testimony at bar is that the larger boxes started to come up out of the hold at about 1830 hours to 1900 hours (112) and presumably continued to come out without incident, until approximately 2200 hours

(when the mate is alleged to have seen a box hanging up). For some three hours, boxes of the larger size were passing along the allegedly inadequate side rails, without falling; thus demonstrating that it was quite likely that the box which did fall was caused to do so by reason of some cause other than the inadequate side rails. The burden of proof was on plaintiff, and he failed to meet even the minimum proof permitted in maritime cases.

The second alleged area of unseaworthiness was the alleged insufficiency of personnel.[6] There was no demonstration that the box was caused to strike plaintiff by reason of the absence of one additional longshoreman on B deck. The trial court, in its opinion with respect to third party claims, made just such a finding; in which regard the court was in error. Plaintiff urged that an additional man at the "turning point" from B deck to A deck (240) could or would have prevented the accident. This is a finding the jury was not entitled to make, since there was no testimony from which such a conclusion could be drawn. This court's attention is directed to the totality of Jackson's testimony in this regard, without the necessity for detailed analysis. The testimony is fragmented, and never even attempts to pinpoint sufficient facts from which the jury could have drawn logical conclusions. This is not a case in which circumstantial evidence will suffice.

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[6] Erroneously referenced by the trial court as one of the plaintiff's grounds under the *negligence* count (240 par. No. 2) Insufficiency of personnel is an unseaworthiness claim *Waldron* v. *Moore McCormack Lines, Inc.,* 386 U.S. 724.

Miscellaneous

Plaintiff's counsel, in his "argument to the jury" urged that as an additional ground for recovery (negligence or unseaworthiness?) the jury could conclude that the absence of safety nets and hard hats were competent producing causes of plaintiff's injuries. The trial court excluded these as grounds and rejected them as viable legal theories, and nonetheless permitted the plaintiff to make the argument to the jury (240). This is reversible error.

In summary, the unseaworthiness count should not have been submitted to the jury, in the absence of a demonstrable *condition*, not arising out of the operational negligence of fellow longshoremen. No such condition, as a competent producing cause of plaintiff's injuries, was demonstrated, or even attempted to be demonstrated.

POINT II

The trial court erred in assessing divided damages against Standard Fruit.

Appellant Standard asserts two grounds for reversal of the third party judgment against it:

1. The trial court did not make adequate or sustainable findings of fact which would sustain the third party judgment against Standard.

2. The court below erroneously misapplied *Cooper Stevedoring Co. Inc.* v. *Fritz Kopke Inc.*, 417 U.S. 106 and *Conceicao* v. *New Jersey Export Marine Capr. Inc.*, 508 Fed. 2d 437 (2 Cir. 1974).

The following discussion becomes moot if this court finds that plaintiff did not make out a prima facie case.

In the event that the plaintiff's judgment against the shipower is affirmed, appellant Standard urges reversal of the judgment against it.

Status of the Parties

Bay Ridge, vis-a-vis Oetker, was a stevedore warranting that it would perform its services in a workmanlike manner. If it is found that Bay Ridge's tortious conduct subjected the shipowner to a damage judgment by a longshoreman, under the doctrine of *Ryan* v. *Pan Atlantic*, supra; Bay Ridge must indemnify Oetker for the *full judgment*, plus costs and counsel fees; and that is the gravaman of Oetker's third party pleading against Bay Ridge. (Third party complaint, Par. Seventh) (10). This claim is in contract and not in tort, *Ryan* v. *Pan Atlantic*, supra. This indemnification may arise out of the conduct of Bay Ridge's agents, servants or employees. The jury did not make a finding of contributory negligence against plaintiff and so *Mortensen* v. *A/S Glittre*, 348 F. 2d 383 (2 Cir. 1965) does not come into play.

The only limitation on the foregoing would be a finding that Oetker was guilty of conduct precluding indemnity. *Weyerhaeuser S.S Co.* v. *Nacirema Operating Co.*, 355 U.S. 563.

The trial court made no such finding of conduct on the part of Oetker which would preclude indemnity, as between Oetker and Bay Ridge. The status of those two litigants is thus quite clear—the shipowner and Stevedore form what has been referred to as part of the "Sieracki-Ryan circle".[7]

Standard vis-a-vis Bay Ridge and Oetker is in a completely different status. With respect to those firms, the

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[7] *Griffeth* v. *Wheeling-Pitt Steel Co.*, 1975 A.M.C. 2527, 2535 (3 Cir. 1975).

allegations are that Standard was a tort feasor, guilty of negligent conduct *contributing* to the plaintiff's accident. (Oetker's third party complaint—Par. Fifteenth) (11). (Bay Ridge's Cross claim against Standard—Par. Twenty-seventh) (27).

Bay Ridge does not seek *indemnity* against Standard (and indeed it would not be entitled to indemnity since it pleads no legal basis therefore); Bay Ridge seeks contribution only, in tort and not in contract. The status of Standard is also quite clear—it is an alleged tort feasor: answerable for its independent tort. The only basis for judgment over against Standard is to be found in *Cooper* v. *Kopke*, supra.

As between Bay Ridge and Standard the limitation of *Weyerhaeuser* v. *Nacirema*, supra and *Conceicao* v. *New Jersey Export*, supra does not come into play, the Honorable court below to the contrary notwithstanding.

Duties of the Parties

Status bespeaks duty. The duty of Bay Ridge was to perform its stevedoring services in a workmanlike manner.

The duty of Standard was to provide Bay Ridge with safe and proper equipment, measured by tort or negligence concepts. In the context of this case, as is demonstrated by the pleadings of the parties, no warranty ran between Standard and Oetker.

Analysis of the Opinion Below Demonstrating Error

Against the backdrop of the foregoing analysis of the maritime law, the conclusion is inescapable that the trial court misapplied the legal concepts, and failed to make appropriate and sustainable findings of fact.

The following are the findings of fact made by the trial court in its opinion (241):

1. Standard Fruit knew or should have known that the taller or Zulu boxes were stowed in the lower hold of the vessel.

2. The side rails on the conveyor customarily used from B deck to A deck were inadequate to contain the taller boxes being transported on the conveyor from B deck to A deck.

3. The conveyors were furnished by Standard to the *other defendants* to unload the vessel.

The court made the following conclusions of law, from the foregoing findings of fact:

A. Standard was negligent in providing the *other defendants* with unseaworthy equipment (241).

B. Standard and the shipowner were joint tort feasors, entitling shipowner to contribution by Standard pursuant to *Cooper Stevedoring* v. *Kopke* (241), in the amount of 50% of plaintiff's judgment against shipowner.

C. The vessel's 50% portion of the judgment is recoverable by shipowner from Bay Ridge pursuant to *Ryan* v. *Pan Atlantic* (243).

D. Bay Ridge is not entitled to *indemnification* from Standard by reason of Bay Ridge's action and inaction with respect to insufficiency of a longshoreman on B deck (243, 244).

E. Standard is not entitled to indemnification from Bay Ridge by reason of Standard's action and inaction with respect to the inadequate and unseaworthy conveyors, which was such as to prevent, hinder or handicap Bay Ridge in perform-in a workmanlike job (241).

Implicitly the court made one additional finding of fact, namely that it was the "use or operation of the conveyor (which) rendered *it* (sic) in an unseaworthy condition" (Special Verdict of Jury (236)). The court "sustains the jury's verdict and the jury's answers to the special interrogatories (241).

The Court's Findings of Fact:

#1—*The finding that Standard knew that Zulu boxes were stored in the lower hold.*

This finding is not supportive of a finding of negligence on the part of Standard. The mere fact that Standard had this knowledge is irrelevant to this issue here. Bay Ridge admittedly had the same knowledge (Testimony of Jackson 110). It was Bay Ridge's own employees who rearranged the discharging equipment at 1830 hours to accommodate the taller boxes. If in fact the longshoreman improperly made equipment changes (110) liability cannot fall upon Standard by reason of the fact that Standard may have had equal knowledge. It was not the knowledge per se which gave rise to tortious conduct, it was the manner in which the longshoremen accommodated to the larger boxes. The court's finding of fact that Standard knew where the cargo was stored was a non sequitur. There is nothing on the record to indicate that Standard was present and involved with the discharging operation. This finding cannot support liability against Standard.[8]

#2. *The side rails were inadequate to contain taller boxes.* This finding is not supported by the record. The

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[8] This novel legal concept would create a burden on all shippers of cargo to respond in damages, even where the shipper is not present and does not supervise. It would open a hornets nest in maritime law.

testimony was to the contrary, that in fact for some three hours the rails did in fact "contain the taller boxes" (112). The mere fact that one box fell does not demonstrate that it fell because the rails failed to support it. There is not one scintilla of evidence to demonstrate that the box which fell actually went over the rail. This was conceded by Salvatore.[9] This was conceded by Jackson.[10] Plaintiff himself did not know either.

There is no support in the record for a finding that the rails were inadequate.

The jury's finding in this regard was that it was the "use or operation" of the conveyor which rendered "it" (the vessel or the conveyor?) unseaworthy. The jury's finding (#5C236) was an *Usner* v. *Luckenbach* finding. There was nothing wrong with the conveyor, it was improperly used. Since Standard did not use it, or supervise its use, the court erred in finding that Standard was guilty of "action or inaction with respect to the conveyors" (241).

#3—*That Standard furnished the conveyors to the other defendants.*

This is a misstatement of the record. The court, in its charge, made reference to stipulations of the parties (215). One stipulation was that Bay Ridge "installed, rigged, unrigged, and repaired and maintained the conveyor equipment aboard the Polarstein, including operation and control" thereof (215). The oral testimony was that Standard turned it over to Bay Ridge. There is no additional testimony or stipulation to indicate that Standard fur-

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[9] Q. You don't know if it was thrown down, dropped down, or kicked off a conveyor, you don't know, is that right? A. No, sir. (94)

[10] Q. And it didn't fall off because the sides were too small, it fell off because you started the machine and it rolled down and hit another box and then, fell off, is that right. A. Well I guess so. (122)

nished the equipment to Oetker. In this regard, the court erred.

Since the three findings of fact upon which the court predicated tortious conduct by Standard are incorrect, its finding of culpability of Standard is clear error, and must be reversed.

The Court's Conclusions of Law:

A. *Negligent providing of unseaworthy equipment to the "other defendants".*

This conclusion of law is predicated upon a mistaken finding of fact. Further, and even more significant, is the absence of all of the elements of negligence: the accident-producing-defect which existed at the time Standard turned it over to Bay Ridge; the length of time such unidentified defect existed; scienter; and of utmost importance, the causal relationship between such unidentified defect and plaintiff's accident.

Standard was sued in *negligence* and negligence only, and the one asserting the claim against it must put in affirmative proof to support negligence. Neither Bay Ridge nor Oetker put on any witnesses, therefore they were probably relying on plaintiff's proof, which, as has been demonstrated, infra, failed to demonstrate the aforesaid elements required to sustain a negligence verdict.

B. *Standard and Oetker were joint tort feasors.*

There is no showing as to the tort of Standard.

C. *Bay Ridge is answerable to Oetker under Ryan for 50% of the plaintiff's judgment against Oetker.* Under Ryan indemnity the ship is entitled to 100% indemnity or none—by definition. There is no such thing as partial indemnity. The court attempted to get around this

problem by first splitting the liability between Standard and Bay Ridge, and then assessing "full indemnity" of Oetker's portion against Bay Ridge. This arrangement is not valid. This is the type of legal fiction attempted without success in *Shellman* v. *U.S. Lines,* 1975 AMC 2471 (Ninth Cir. 1975).

Items D & E, supra demonstrate a misapplication of the concept of conduct precluding indemnity by reason of the "prevent or hinder test". This court, recently (December 9, 1975) had occasion to make an excellent analysis of this very problem. *Rodriguez* v. *Olaf Pedersen's Rederi,* 527 F.2d 1282, sustaining Judge Neaher, this court demonstrated the error of confusing conduct precluding indemnity with concurrent fault: citing the Supreme Court in *Weyerhaeuser,* it recalled: "shipowners fault

> ". . . must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. *Mere concurrent fault is not enough.*" (Italics added).

At bar the court found (albeit erroneously) that plaintiff's accident resulted from inadequate side rails (charged against Standard) and insufficient longshoremen (charged against Bay Ridge) and concluded (243):

> "These cross claims and counterclaim (between Standard and Bay Ridge) must be dismissed. Standard Fruit's action and inaction with respect to the inadequate and unseaworthy conveyor was such as to prevent, hinder or seriously handicap the stevedore in performing a workmanlike job and Bay Ridge's action or inaction with respect to the insufficiency of a longshoreman on B deck was such as to preclude it from any right to indemnification."

The falacies, logical and legal, in the foregoing, are several. With respect to Standard's rights, how could Bay Ridge "prevent or hinder" Standard, when Standard was not performing any act or duty aboard ship. Prevent or hinder, as defined in *Conceicao,* involves an affirmative act which prevents another from doing some other affirmative act. Standard was doing no affirmative acts on board the vessel. What was Standard's inaction?

On the other hand, what did Bay Ridge do, by way of providing an inadequate staff, which prevented or hindered Standard?

The answer to this court-created dilemma is simple. The prevent or hinder doctrine is inapposite here. Assuming that plaintiff was injured by reason of the two items found by the court, i.e. bad side rail and short crew; at best one is dealing with concurrent fault, and not conduct precluding indemnity.

There is no doctrine of "conduct precluding contribution", between joint feasors.

The facts at bar are unrelated to *Conceicao,* and are closer to those in *Hurdich* v. *Eastmount Shipping Corp.,* 503 F 2d 307 (2 Cir. 1974). In *Rodriguez* this court demonstrated the importance of separating the various concepts: "conduct precluding indemnity" from "concurrent fault" from "intervening cause".

At bar, assuming that Standard provided an inadequate conveyor (which is denied and unproven), and that, as demonstrated on this record, the stevedore used the inadequate conveyor in a manner which was accident producing (which is also unproven), at best, the liability of Bay Ridge would be an intervening cause. Citing *Rodriguez* v. *Olaf Pedersen,* supra:

> "During all of this period, the shipowner's employees (substitute Bay Ridge here) had exclusive control over the area, and the ship (read Bay Ridge here) 'alone was capable' of correcting the dangerous condition, which it negligently failed to do . . . it was an intervening cause."

Be the cause "concurrent" or "intervening" we are dealing with matters unrelated to the prevent or hinder test, which can only arise where there is an issue of *indemnity*. The claims against Standard are bottomed on contribution for an alleged negligent act, and not indemnity, and the court erred in applying the prevent or hinder test.

This intermingling of legal concepts, and intermingling of negligence and seaworthiness concepts, demonstrates the clear error below. The court having made unsupportable findings of fact, and arrived at inapposite conclusions of law, the judgment against Standard Fruit should be reversed and the third party complaint against it dismissed, with costs.

Respectfully submitted,

SERGI & FETELL
Attorneys for Third Party Defendant-Appellant, Standard Fruit Co.

LESTER E. FETELL
Of Counsel

THE UNITED STATES COURT OFAPPEALS FOR THE SECOND CIRCUIT

CASTELLANO

V

OETKER,

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

AFRIM HASKAJ being duly sworn,
deposes and says that he is over the age of 21 years and resides at 1481 42nd street, Bklyn, NY

That on the 21st day of april, 1976 ~~, 1976~~

he served the annexed appendix upon
brief of third party defendant - appellant Standard Fruit Co
Exhibit Volume

Kirlin Campbell & Keating, attorneys for Bay Ridge Op Co, 120 broadway, NY, NY

Cichanowicz & Callan, attorney s for Rudolph A Oetker, 80 Broad street, N.Y, N.Y

Irving B. Bushkow, attorney for the plaintiff-appellee, 26 court st eet NY, NY

in this action, by delivering to and leaving with said attorneys
three copies each of the brief and appendix and ~~two copies to each thereof~~
one copy each of the Exhibit volume

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 21st
day of april, 1976, ~~1975~~

Afrim Haskaj

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977